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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1919

No. 171

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner-Respondent

AGAINST

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Respondent-Libellant

BRIEF FOR RESPONDENT-LIBELLANT

FIRST POINT

THIS SUIT DOES NOT PROPERLY INVOLVE THE ARBITRATION CLAUSE OF THE CHARTER-PARTY BECAUSE THE PETITIONER CANCELLED THE CHARTER-PARTY AND MADE NO DEMAND FOR ARBITRATION.

The charter clause on which the petitioner rests its case reads:

"21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or

Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight" (Trans. p. 7).

This provision should not influence the decision of the case, because the petitioner deliberately "cancelled" the charter-party; neither the petitioner nor the captain of the *Atlanten* requested arbitration of any dispute, but, on the contrary, the petitioner indicated its intention that the matter be decided by the courts; and the cancellation put an end to the arbitration clause as well as all other clauses of the charter-party.

January 8, 1915, the petitioner wrote the respondent partly as follows:

"We regret to advise that we are compelled to cancel the *Atlanten's* charter-party Pensacola to Scandinavia, and are ready to take all the consequences the court after clause No. 21 [24] in the charter-party will compel us to pay, not exceeding the estimated amount of freight" (10).

The respondent wrote the petitioner January 13, 1915, stating that the petitioner had cancelled the charter-party (11). January 14 the petitioner replied and concluded by stating: "We have now definitely decided to cancel the charter-parties" (13)—the correspondence dealt also with the charter-party of another steamer not involved in this suit.

This correspondence is not set forth in the briefs filed by the petitioner and by the New York Chamber of Commerce.

We think that the effect of this correspondence, which shows that the petitioner deliberately cancelled the whole

charter-party (including the arbitration clause) and evidenced its intention to let the case be decided by the Court, is to close the door to consideration of arbitration, which is for this case merely a moot question. Certainly it will not be argued seriously that the captain of the steamer (merely an agent of the petitioner for the purpose of carrying out the physical steps required for performance of the charter-party) could revive the charter-party and initiate an arbitration after the petitioner itself had cancelled the charter-party and thus deprived the captain of all authority to act under it; if he could, it is enough to say that he did not. Indeed, the construction of the arbitration clause is such that it could be applicable only to disputes arising in the course of loading or discharging or otherwise in connection with the performance of the main purpose of the charter, which was to load, carry and deliver the cargo.

After suit brought it was too late for the respondent to insist on arbitration, it having theretofore rejected arbitration specifically with its rejection of the whole contract. The case is within the spirit of Mr. Justice Swayne's language in *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-268:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold* v. *Banks*, 8 Wend. (N. Y.) 562; *Holbrook* v. *White*, 24 *id.* 169; *Everett* v. *Saltus*, 15 *id.* 474; *Wright* v. *Reed*, 3 Durnf. & E. 554; *Duffy* v. *O'Donovan*, 46 N. Y. 223; *Winter* v. *Coit*, 7 *id.* 288."

The disabilities of the repudiating party are further illustrated by the decisions holding that refusal to perform the contract on one ground waives other grounds of objection. In *Empire Implement Mfg. Co.* v. *Hench*, 219 Pa. St. 135, the owner of a patent by his agent made a contract with the defendant whereby the defendant was to sell grinding machines, the owner agreeing to secure patents in various foreign countries where the machines should be sold by the defendant. Before these foreign patents could be secured the defendant repudiated the contract on the ground of lack of authority of the owner's agent. The defense was raised that the foreign patents had not been secured. The Court said at page 145:

"A sufficient reason why the point should have been refused is that the contract was not repudiated because the patents had not been protected in the countries in which the machines were to be sold. On July 22, 1899—barely two months from the time it was delivered by Jones to the appellee—and before the latter could reasonably have been expected to have the patents protected in all of the countries named, the appellants repudiated the contract on the sole ground of want of authority in Jones to make it."

In *Braithwaite* v. *Foreign Hardwood Co.* [1905] 2 K. B. 543, the buyers repudiated a contract for the sale of rosewood to be delivered at Hull in instalments during 1903, and refused to accept any rosewood under it on the ground that the seller had broken a collateral oral agreement not to supply rosewood that year to any other person in the trade. The buyers refused to accept the bill of lading for both the first and second consignments tendered to them, and the seller brought action for damages. Later the buyers became aware that part of the rosewood in the

first consignment was not of the contract quality. The Court of Appeal held that by refusing to take delivery of the consignments when tendered on the ground that they had already repudiated the entire contract (the repudiation having been found to be wrongful) the buyers had waived performance of conditions precedent by the sellers, who were entitled to collect as damages the difference between the contract price of the rosewood and the lower price at which they had sold it. Collins, *M. R.*, said, at page 551:

"In the present case, after there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment; but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract and refused to be bound by it. In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them."

See also *Life Ins. Co.* v. *Pendleton*, 112 U. S. 696; *Grattan* v. *Metropolitan Life Ins. Co.*, 80 N. Y. 281; *Clarkson* v. *Western Assurance Co.*, 92 Hun, 535; *Hicks* v. *Assurance Co.*, 13 A. D. 448; *Robinson* v. *Frank*, 107 N. Y. 656; *Smith* v. *Wetmore*, 167 N. Y. 234; *Honesdale Ice Co.* v. *Lake Ladore Improvement Co.*, 232 Pa. St. 293.

The House of Lords has held that repudiation of a contract makes an arbitration clause inapplicable.

In *Jureidini* v. *National British & Irish Millers Ins. Co. Ltd.*, [1915] A. C. 499, Lord Chancellor Haldane said, at page 505:

"Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

In that case the Insurance Company denied liability on its policies on the ground that the loss was caused by the felonious acts of the assured, charging arson and contending that the claim was fraudulent. The policy contained an arbitration clause to the effect that going to arbitration was a condition precedent to the right to sue.

The Lord Chancellor also said, at pages 505, 506:

"There has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract." * * * "The jury found that the case of fraud and arson had broken down: they found for the plaintiffs upon those issues, and the learned judge gave judgment, not that the case should go to arbitration, but for 3000 £; and I think that was probably right, the arbitration clause having gone with the repudiation."

And Lord Dunedin said, at page 507:

"It seems to me that when the attitude was taken up by these parties, which was taken up in the letters

which have been read to us which the Lord Chancellor has referred to, in England,—that they repudiated the claim altogether and said that there was no liability under the policy,—that necessarily cut out the effect of clause 17 as creating a condition precedent against all forms of action."

We do not see wherein the petitioner's attempted distinction of the *Jureidini* case affects the proposition which it states, notwithstanding *Woodall* v. *Pearl Assurance Co. Ltd.*, 24 Com. Cas., 237, cited by the petitioner. It is submitted that the petitioner's cancellation of the charter was an absolute and complete repudiation of it. The offer to pay a penalty or damages according to clause 24 cannot be considered performance. The contract was on the part of the respondent to ship a cargo and pay freight, and on the part of the petitioner to receive and transport the cargo, and that was the contract which the petitioner repudiated.

There are many other instances of contract limitations displaced by repudiation.

In *O'Neill* v. *Supreme Council, American Legion of Honor*, 70 N. J. L., 410, 422, 423, where the Council reduced the amount payable under an outstanding benefit certificate from $5,000 to $2,000, Mr. Justice Pitney said concerning a limitation of one year for bringing action:

"When the defendant, on its part, broke the contract, it absolved the plaintiff from the obligation thereof and the action to recover damages for such abrogation is not subject to any limitation that arises solely out of the terms of the contract that has been abrogated."

In *Strom Bruks Aktie Bolag* v. *Hutchison,* 6 Sess Cas., 5th Ser. 486, 10 Asp. M. C. 138, a charter-party contained the following clause:

"Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

The owners wholly failed to furnish a vessel for one of the shipments. Lord Ordinary Kyllachy said at page 488:

"I see nothing to take the case out of the general rule that a penalty clause attached to a charter does not deprive the shipper of his option to have his damage assessed at common law. I consider further that, even if the clause falls to be read as stipulation for liquidated damages, it is not, on its just construction, applicable to a total failure by the shipowner with respect to one of the shipments stipulated."

The deviation cases further illustrate the effect of repudiation on contract exceptions and limitations. In *Scrutton on Charter-Parties,* 8th Ed., p. 250, it is said:

"The effect of deviation is to displace the special contract of the charter party or bill of lading, together with all exceptions therein. The shipowner will, therefore, be liable to the charterer or cargo owner for any loss or damage which the goods sustain, unless he can show that the loss or damage was occasioned either by the act of God, or by the King's enemies, or by inherent vice of the goods, *and* that the said loss or damage must equally have occurred even if there had been no deviation. And it is immaterial whether the loss or damage arises before, or during, the deviation, or after it has ceased.

In *Joseph Thorley Ltd.* v. *Orchis S. S. Co.,* [1907] 1 K. B. 660, it was held that because the steamship *Orchis* had deviated from the voyage described in the bill of

lading, which was from Limassol to London, her owners could not take advantage of an exception clause excusing them from liability for neglect or default of stevedores. To the same effect is *James Morrison & Co. Ltd.* v. *Shaw Savill & Albion Co. Ltd.*, [1916] 2 K. B. 783, where the shipowner was held liable for loss of wool cargo due to the vessel being torpedoed, because she had deviated.

Likewise, bill of lading clauses limiting liability to a certain amount are displaced by deviation. In *Balian* v. *Joly Victoria & Co.*, 6 Times Law Reports, 345, the bill of lading contained a clause limiting liability to £5 per package unless a greater value was declared. Tobacco shipped at Lagos arrived in London by another ship and another route than that contemplated in the bill of lading. The Court of Appeal held the deviation an answer to the defense made by the shipowner to a damage claim, that value in excess of £5 per package had not been declared.

The result reached by the foregoing decisions may be explained by saying that consideration has failed by act of the repudiating party, and that therefore there is no consideration for the other party still being bound; or it may be said that the repudiating party has failed to perform a condition precedent, *i. e.*, performing the contract or attempting to do so (as in the *Clark* case, Appendix to petitioner's brief), which alone will enable him to avail of the provisions of the contract. The right to avoid defenses asserted by a party whose repudiation has deprived of consideration the contract in which the asserted defenses are contained is analogous with the right to recover back or to refuse payment of money under a contract the consideration of which has failed or never existed. *Nash* v. *Towne*, 5 Wall. 689, 701-702.

SECOND POINT

ARBITRATION AFFECTS THE REMEDY ONLY, AND THEREFORE THE PROCEDURE THAT MIGHT HAVE BEEN FOLLOWED IN SWEDEN OR DENMARK IS IMMATERIAL IN THIS CASE, OUR LAW BEING THAT ARBITRATION AGREEMENTS DO NOT BAR OR OUST THE JURISDICTION OF OUR COURTS.

The proposition that an arbitration clause which has the effect of disposing of all matters in controversy, including questions of liability as well as of fact, will not be enforced against the objection of one of the parties to the contract need not be discussed at length, because it has been firmly established by the decision of this Court in *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, where a policy of fire insurance provided:

"In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the Company under this policy."

The plaintiff refused to submit to an award of arbitrators in accordance with this provision. Mr. Justice Gray held that this arbitration clause did not bar the plaintiff's action, and said, at page 385:

"A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was

adjudged in *Hamilton* v. *Liverpool, London & Globe Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract."

The arbitration clause in this case purports to dispose of all questions, whether of fact or law. The provision is that any dispute is to be "settled" and that the decision of the arbitrators "shall be final".

The authorities were reviewed by Judge Hough in the Southern District of New York in *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co. Ltd.*, 222 Fed. Rep. 1006. In a subsequent motion in the same case (opinion unreported) Judge Hough said:

"The fact that the respondent and the impleaded party are both English is unimportant. The rule regarding arbitration agreements which wholly oust jurisdiction is of the forum, *i. e.*, relates to remedy, not to right. Motion denied.'

In *Meacham* v. *Jamestown, F. & C. R. R. Co.*, 211 N. Y. 346, a building contract conferred upon an arbitrator power to determine the effect of any stipulation in the contract and whether or not there had been performance, and to decide all matters in dispute arising out of the contract. The contract was made in Ohio, the contracting parties were Pennsylvania corporations, and the work, construction of a section of railroad, was to be done in Pennsylvania. This provision for arbitration was valid in Pennsylvania. The plaintiff, as assignee of the con-

tractor, brought action in New York to recover $30,079.29 for work performed and materials furnished, disregarding this provision for arbitration. Hogan, *J.*, said at pages 351-352:

"Tested by the principles of the cases cited, we conclude that the language employed in the contract in question is susceptible of but one construction, namely, an attempt on the part of the parties to the same to enter into an independent covenant or agreement to provide for an adjustment of *all* questions of difference arising between the parties by arbitration to the exclusion of jurisdiction by the courts.

Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts (*White* v. *Howard*, 46 N. Y. 144; *Despard* v. *Churchill*, 53 N. Y. 192; *Faulkner* v. *Hart*, 82 N. Y. 413; *St. Nicholas Bank* v. *State Nat. Bank*, 128 N. Y. 26; *Marshall* v. *Sherman*, 148 N. Y. 9; *Dearing* v. *McKinnon, D. & H. Co.*, 165 N. Y. 78; *Hutchinson* v. *Ward*, 192 N. Y. 375) shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state."

And Cardozo, *J.*, concurring, said, at pages 352-353:

"An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. In applying this rule, regard must be had not so much to the form of the agreement as to its substance. If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned (*Benson* v. *Eastern B. & L. Assn.*, 174 N. Y. 83; *Nute* v. *H. M. Ins. Co.*, 6 Gray, 174, 180; *Slocum* v. *Western Assur. Co.*, 42 Fed. Rep. 235; *Gough* v. *Hamburg Am. Co.*, 158 Fed. Rep. 174), it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action. A rule would not long

survive if it were subject to be avoided by so facile a device. Such a contract, whatever form it may assume, affects in its operation the remedy alone. When resort is had to the foreign tribunal for the purpose of determining whether certain things do or do not constitute a breach, the cause of action must in the nature of things be complete before jurisdiction is invoked, and cannot be postponed by the declaration that it shall not be deemed to have matured until after judgment has been rendered. This must be so whether the tribunal is a court or a board of arbitrators. Indeed, the considerations adverse to the validity of the contract are more potent in the latter circumstances, for in the one case we yield to regular and duly organized agencies of the state and in the other to informal and in a sense irregular tribunals (*Mittenthal* v. *Mascagni,* 183 Mass. 19, 23). In each case, however, the fundamental purpose of the contract is the same: to submit the rights and wrongs of litigants to the arbitrament of foreign judges to the exclusion of our own. Whether such a contract is always invalid where the tribunal is a foreign court, we do not need to determine. There may conceivably be exceptional circumstances where resort to the courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction (*Mittenthal* v. *Mascagni, supra*). If any exceptions to the general rule are to be admitted, we ought not to extend them to a contract where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators. Whether the attempt to bring about this result takes the form of a condition precedent or a covenant, it is equally ineffective."

The exceptions filed to the answer do not admit that even in Denmark or Sweden suit could not have been brought without an arbitration first having been had. The allegations as to arbitration being a condition precedent are mere conclusions. Even if they were to be considered as established facts (for the purpose of the exceptions), their effect would be wholly overcome by the

petitioner's correspondence showing that it did not ask arbitration, but proposed that the courts should settle the matter.

The petitioner's suggestion that because both parties are foreigners jurisdiction of our courts should have been declined is without force now. Jurisdiction was taken, perhaps as a matter of discretion, but nevertheless properly taken, and in the absence of a clear showing of abuse of discretion the question whether jurisdiction should have been declined by the District Court is not open. *Goldman* v. *Furness Withy & Co.*, 101 Fed. Rep. 467, did not present an analogous situation. There Judge Brown declined to exercise jurisdiction in a suit involving a contract of carriage made and to be performed in Canada, but he distinguished *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, on the ground that the contract in that case involved transportation to New York. The fact that the contract in this case involved transportation of goods from this country is a sufficient reason for our courts taking jurisdiction of the dispute. See *The Belgenland*, 174 U. S. 355; *The Jerusalem*, 2 Gall. 191, Fed. Cas. 7293.

What the petitioner and the Chamber of Commerce apparently desire is that this arbitration agreement should have been specifically enforced. We find no authority for such relief on a contract of this nature, where irreparable damage or other grounds of equity jurisdiction cannot result from non-performance of the covenant, and it seems to be settled that the only relief for breach of a covenant to arbitrate is damages at law, which in most cases are merely nominal. *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. Rep. 787.

We do not deal separately with the various arguments presented in the brief filed by counsel for the New York Chamber of Commerce and in his book "Commercial Arbitration and the Law". An intelligent review of that book is found in the Harvard Law Review for March, 1919, Vol. 32, p. 584.

THIRD POINT

THE COURTS BELOW CORRECTLY DECIDED THAT THE PETITIONER'S LIABILITY WAS NOT LIMITED TO THE ESTIMATED AMOUNT OF FREIGHT.

Clause 24 of the charter provided:

"Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight" (8).

The petitioner contends that its liability should have been limited to the freight payable by the respondent under the charter party if a cargo had been loaded and the charter-party performed. This limited amount is speculative and uncertain, being capable of determination only by loading of a cargo, until which time it could only be "estimated".

The reasons we have stated in the preceding point of this brief for non-applicability of collateral provisions of a contract which has been repudiated apply with equal force to clause 24, and we shall not repeat them here.

But if by any course of reasoning it should be supposed that clause 24 were still in the case, we are prepared to show that it does not limit the damages.

If the clause provides for a penalty, as its first word indicates, it is invalid. The petitioner does not contend that it is a provision for liquidated damages. Therefore it must show that the clause is a limitation of liability.

As for limitation of liability, the clause could hardly have been drawn worse, if that was its purpose. The liability limited (assuming that purpose) would apparently be that of the charterer to the shipowner, and not that of the shipowner to the charterer, since damages in terms of freight are intelligible only when understood as owner's damages for a charterer's breach. Moreover, the charter calls the clause a penalty. Perhaps this is not conclusive, but in *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17, Chief Justice Marshall said:

"The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention."

The authority against the petitioner's contention is overwhelming.

In *Watts* v. *Camors,* 115 U. S. 353, 361, Mr. Justice Gray said:

"In such cases, accordingly, the courts of the United States, sitting in admiralty, award the damages actually suffered, whether they exceed or fall short of the amount of the penalty."

The District Judge reviewed the penalty clause carefully in the light of the authority existing at the time of his decision, and came to the following conclusion:

"To add to the penalty clause the words 'proven damages' changed nothing whatever; it merely made express what the law imposed in any event. There is therefore not the least reason for supposing that the addition of

these words in the charter party was intended to effect a limitation of liability; there was as much ground, when the penalty was in a stated sum, to argue that its presence necessarily implied that the parties intended to limit any liability as after the words were added. Yet we see that the courts did not accept that conclusion when the clause was in its earlier form. It seems to follow, therefore, that Mr. Justice Bailhache could not have reached a different result in *Wall* v. *Rederiaktiebolaget, supra,* from what he did, without disregarding the whole history of the clause" (20).

The English Decisions

Judge Hand's views are well supported by *Wall* v. *Rederiaktiebolaget Luggude,* [1915] 3 K. B. 66. After stating the history of the clause Judge Bailhache there said, at pages 73-74:

"Having got so far I ask myself, if I desired to perform the idle task of inserting a penalty clause in to a charterparty, and at the same time desired to express in words the true legal effect of such a clause instead of leaving the legal effect to be supplied by the parties themselves from their no doubt intimate knowledge of the statute of William, and if at the same time I desired to conciliate the conservatism with which commercial men always regard their familiar documents, how could that be done? Well, I must obviously take the common form and work upon that; I must add something, but as little as possible, to it; and the common form then very naturally takes the shape 'Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight;' and that is clause 15 of this charterparty. Clause 15, therefore, is nothing more than the common form writ large. This seems to me to solve the question I have to decide, and to solve it in favour of the plaintiffs. Clause 15 is a penal clause and not a limitation of liability clause, and the plaintiffs are right in disregarding it."

The *Wall* case was approved by the House of Lords in *Watts, Watts & Co. Ltd.* v. *Mitsui & Co. Ltd.* [1917]

A. C. 227, which involved the same clause. At page 235 Lord Chancellor Finlay said:

"I agree with the construction put in the Courts below on clause 13—the penalty clause. If this clause had appeared for the first time I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract.

"In my opinion the judgment of Bailhache, *J.*, in the present and in the earlier case before him on this point were right."

At pages 244-245 Lord Dunedin said:

"This view makes the discussion as to the limitation of liability under the penalty clause of no practical importance. But I wish to say that had it been necessary to decide the point I should have only wished to express my approval of the admirable judgment of Bailhache, *J.*, in the case of *Wall*."

And at page 246 Lord Sumner said:

"My Lords, I have no doubt that clause 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word 'penalty'. True the use of that word is not decisive; but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum; and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner's liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship's default. If he is insured, he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse, and must suffer for this in one way or another. Nothing could be less like a 'genuine covenanted pre-

estimate of damage'; *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, per Lord Dunedin. The whole matter has been fully and, if I may say so, admirably discussed by Bailhache, *J.*, in the recent case of *Wall* v. *Rederiakriebolaget Luggude*. Your Lordships decided the point in *Ströms Bruks Aktie Bolag* v. *Hutchinson* upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all."

When the *Watts* case, last cited, was before the Court of Appeal, [1916] 2 K. B. 826, this clause was discussed at some length. Swinfen Eady, *L. J.*, said, at pages 843-845:

"There remains the third point. It is contended that, having regard to clause 13 of the charter-party, the general damages recoverable are limited to £3,500, the estimated amount of freight. This clause is a little different from the clause which used formerly to be inserted in charter-parties. The old form was 'Penalty for non-performance of this agreement estimated amount of freight' There is no doubt that in such a case the estimated amount of the freight was a penalty. On proof of the breach judgment could have been recovered for the amount of the penalty, but only as a penalty, and execution would have been limited to the damages which were proved, the judgment only standing as security for such damages. That was the position if the action was brought in respect of the penalty. At the same time the plaintiff would have been entitled to sue for general damages, and he would have recovered whatever damages were proved to have resulted in the ordinary course. In the present charter party the clause runs thus: 'Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight'. It is a form which seems to have been in use for a considerable time, because in Scrutton on Charter-parties, 4th ed., p. 322, published in 1899, the form given is in substantially the same language—'penalty for non-performance of this agreement to be proved damages not exceeding estimated amount of freight due under this charter'. There is a

footnote: 'This clause is worthless and unenforceable.' Bailhache, *J.*, was of opinion that the parties here only intended to express in an extended form the effect of the ordinary penalty clause. He thought that the clause was nothing more than the old common form writ large. That is not quite accurate. Under the old form, as I have pointed out, judgment could be recovered for the penalty as such. Under the amended form the plaintiff could not recover judgment for the entire estimated amount of freight as a penalty, because it is not a penalty. The clause says that the penalty is to be the 'proved damages not exceeding the estimated amount of freight'. The proved damages as such cannot be a penalty, because that is the sum which the plaintiff is entitled to recover. The learned judge, has, however, given the true explanation of the clause, namely, that the framers of the clause endeavored to state the effect of the old form and they endeavored to improve it. At any rate the clause comes within that head of the charterparty which purports to provide a penalty for non-performance of the charter, and it has no reference to a claim for general damages. Whether or not the clause be meaningless as a penalty clause, it does not limit the amount which can be recovered under the charterparty as general damages. Suppose, for instance, an action were brought on the charterparty against the shipowner for breach of the implied condition to supply a seaworthy ship, it might be that the loss would be very great. The action could be brought on the charterparty, although it is usually brought on the bills of lading, and if it were brought effectively on the charterparty it could not be contended that in such a case the damages were so limited. In *Elderslie Steamship Co.* v. *Borthwick*, Lord Macnaghten said: 'It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.' In my opinion, having regard to the construction of the charterparty as a whole, this clause has no reference to the general damages; it has only reference to the penalty, and it may be that, owing to the language in which it is expressed, where the clause is in this form there is in strictness no penalty. It cannot, however, be held to limit the general damages recoverable for breach of contract."

Phillimore, *L. J.*, concurred in the judgment of Swinfen Eady, *L. J.*, though with hesitation. At page 849 he said:

"I am ready to agree, although reluctantly, with the other members of the Court upon this ground, and upon this ground only, that the parties have used the word 'penalty', which *prima facie* means that it is a penalty, that they have not sufficiently varied from the old form, which had an established construction, to show that they intended that there should be any serious variation other than that which I have mentioned, and that it would have been very easy, if they had meant to frame a limitation of liability clause, to have expressed it in words about which there could be no doubt."

And Bankes, *L. J.*, said, at page 851:

"There remains one further point upon the construction of clause 13 of the charterparty. It is said on behalf of the defendants that upon the true construction of the exact language of that clause it ought to be interpreted as a clause limiting liability, and not as a penalty clause. If it is open to the shipowners to rely upon a strict construction of the clause, I am not prepared to say that that is not the meaning that ought to be, or at any rate that might be, placed upon it. The plaintiff's counsel, however, appeal to the principle which has been laid down in many cases, and amongst others in *Elderslie Steamship Co.* v. *Borthwick*, where Lord Macnaghten said: 'It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.' The history of this clause is this. For a long period of time there has been inserted in charterparties a clause which has come to be known as the penalty clause, and it has been expressed in a well-known form of words. The clause commenced 'Penalty for non-performance of this charter', or 'this agreement', and it ended with the words 'estimated amount of freight'. It has been accepted by business men and lawyers that the clause, so commencing and known as the penalty clause, is worthless and unenforceable. In my opinion, applying the principle

which Lord Macnaghten stated, if the shipowner desires to clothe his clause with vitality he must dress it up in an entirely new suit of clothes; but so long as its identity is concealed either wholly or partially by the old clothes he cannot escape the application of the rule that if he seeks to limit his liability he must do so in plain words. It cannot be said that he has used plain words so long as the opening words of the clause are in the well-known form which has been accepted to represent a worthless and unenforceable clause. Upon this ground I think that the defendants are not entitled to say that this is a clause limiting their liability."

Strom Bruks Aktie Bolag v. *Hutchinson*, 6 Sess. Cas. 5th Ser. 486, involved the following clause:

"Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

In the Scotch Court of first instance the Lord Ordinary said, 6 Sess. Cas. 5th Ser., at page 488:

"The defender's first contention is that the penalty clause of the charter limits the damage payable for non-performance to the estimated freight on the quantity not shipped. I do not, however, consider that there is anything in this contention. I see nothing to take the case out of the general rule that a penalty clause attached to a charter does not deprive the shipper of his option to have his damages assessed at common law."

On appeal to the Court of Session, Lord McLaren said, 6 Sess. Cas. 5th Ser., at page 493:

"The defender's first proposition is that the penalty clause of the charter party restricts the claim to a sum equal to 'an estimated amount of freight on quantity not shipped'. Now, without admitting that any unqualified rule can be laid down for determining whether 'penalty' means penalty or liquidated damages, it may be affirmed that in general a claim of damages will not be held to be liquidated unless there is some intelligible relation be-

tween the specified penalty and the damage which may be or has been sustained. In the present case 'estimated amount of freight' is intelligible as a measure of damages where the shipper fails to supply cargo at the proper time, and the owners have lost their freight. But it is not a measure that can be applied to the case of a breach of contract by the shipowner, because what the merchant suffers by such breach is not a loss of freight, or of anything corresponding to freight, but the loss of profit on a resale, or the loss of the use of the goods for the purposes of his business. Even if the question were not settled by authority and practice, as I think it is, I should be of opinion that a penalty clause in the terms quoted does not deprive the shipper of his right to have an award of damages commensurate with the loss which he is able to prove."

On appeal to the House of Lords Lord Macnaghten said, 10 Asp. M. C. 138, 139:

"In the first place the respondents contended that, by the terms of the charter-party, damages for breach of contract was limited to the estimated amount of freight on quantity not shipped. Both courts have rejected this contention, treating the question as settled by authority. On this point I have nothing to add to what was said by the Lord Ordinary and by Lord M'Laren in the Court of Session."

Clause 24 has nothing in common with those contract clauses which serve to limit liability. The clauses in bills of lading limiting liability to $100 or to invoice value show an intelligible and clearly intended relation between the limit of liability fixed and the subject matter contracted about, being upheld on the theory that the limit of liability is based on the value of the goods or that the freight rate is fixed in contemplation of the limited value of the goods. See *Hart* v. *P. R. R. Co.*, 112 U. S. 331, 337; *Pierce* v. *Wells Fargo & Co.*, 236 U. S. 278, 283;

Hohl v. *Nord-Deutscher Lloyd*, 175 Fed. Rep. 544. Even such clauses are not upheld when they are ambiguous. *Lines* v. *Atlantic Transport Co.*, 223 Fed. Rep. 624.

Likewise, the cesser clause in charter-parties, which provides that after the cargo is loaded the charterer's liability shall cease, is uniformly limited to those liabilities of the charterer to the shipowner which are protected by a lien on the goods. In *Clink* v. *Radford* [1891] 1 Q. B. 625, 627, Lord Esher said:

"In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter-party, is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that this shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract."

See also *Hansen* v. *Harrold Bros.* [1894] 1 Q. B. 612; *Crossman* v. *Burrill*, 179 U. S. 100; *Elvers* v. *Grace & Co.*, 244 Fed. Rep. 705.

Another illustration of the cutting down of exemption is the "personal contract" doctrine in cases of limited liability under the Revised Statutes, where, notwithstanding the provision of the statutes that in no case shall the liability of the owner exceed the value of the vessel and her freight pending at the end of the voyage, it is held that the liability of the owner on personal contracts is not limited by the statute. See *Great Lakes Towing Co.* v. *Mill Transp't Co.*, 155 Fed Rep. 11; *Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Ref'g Co.*, 248 U. S. 139.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, WITH COSTS.

BURLINGHAM, VEEDER, MASTEN & FEAREY
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